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No. 03-269

In the Supreme Court of the United States

SHIREEN E. WETTERGREEN, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1252(b)(1), provides that petitions for review of administrative orders of removal must be filed in the appropriate court of appeals "not later than 30 days after the date of the final order of removal." The question in this case is whether, when the Board of Immigration Appeals initially mailed its final removal order to the alien at an incorrect address, the statutory 30-day period nevertheless began to run on the date of the order.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 4-6) is unreported. The order of the Board of Immigration Appeals (Pet. App. 11-14) and the decision of the immigration judge (Pet. App. 15-32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2003. A petition for rehearing was denied on March 18, 2003 (Pet. App. 1-3). The petition for a writ of certiorari was filed on June 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No.

104-208, Div. C, 110 Stat. 3009-546, a petition for judicial review of a deportation order of the Board of Immigration Appeals (BIA) had to be filed in the appropriate court of appeals "not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony * * *, not later than 30 days after the issuance of such order." 8 U.S.C. 1105a(a)(1) (1994). IIRIRA established, among its other reforms, a new form of immigration proceeding (known as "removal") that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229, 1229a. IIRIRA also repealed the former 8 U.S.C. 1105a(a)(1) and substituted a new provision specifying that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1).

2. Petitioner is a native and citizen of South Africa. Pet. App. 17. In 1994, she and her family were admitted to the United States after her husband obtained a visa as a non-immigrant temporary worker. *Id.* at 17-18. Petitioner did not leave the United States when her authorization to be in this country expired. *Id.* at 18. In June 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner and her family under 8 U.S.C. 1227(a)(1)(B). Pet. App. 17.

At her removal hearing before an immigration judge, petitioner conceded that she is removable from the United States but applied for asylum under 8 U.S.C. 1158, as well as withholding of removal under 8 U.S.C. 1231(b)(3). Pet. App. 17. In seeking relief from removal, petitioner asserted that, as a white South African, she would be persecuted in South Africa on account of her race. See *id.* at 18-23. The immigration judge

denied petitioner's applications and ordered her removed to South Africa unless she departed voluntarily. *Id.* at 23-29.

3. On May 17, 2002, the BIA dismissed petitioner's administrative appeal and ordered petitioner removed if she did not depart voluntarily. Pet. App. 12-14. The BIA determined that petitioner's claim for relief from removal "is based solely upon the general state of violence and lawlessness in South Africa stemming from the May 1994 change in government" and that the record evidence showed that "individuals such as [petitioner], i.e. apolitical white men and women, are far less likely to be the victims of violence and crime" than other segments of the South African population. *Id.* at 13.

On the day the BIA entered its decision, May 17, 2002, it mailed a copy of the decision to petitioner's counsel of record at 4000 Hollywood Boulevard, in Hollywood, Florida. Pet. App. 39; see *id.* at 11.* Petitioner asserts that, in June 1998, her counsel had filed a change of address notice with the BIA, giving a new address of 4437 Hollywood Boulevard. Pet. 3-4. On August 30, 2002, the BIA sent a "second mailing" of the May 17, 2002, decision to petitioner's counsel at 4437 Hollywood Boulevard. Pet. App. 10.

4. On September 26, 2002, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a petition for review of the BIA's final order of removal. Pet. App. 61-62. On October 10, 2002, the

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* The Petition Appendix (at 11) indicates that the BIA's May 17, 2002, notice was mailed to 4437 Hollywood Boulevard. Government records and petitioner's own submission in the court of appeals indicate that the May 17, 2002, notice was mailed to 4000 Hollywood Boulevard.

court of appeals notified the parties that "it appears this court may lack jurisdiction over this appeal" and asked the parties to address whether IIRIRA's 30-day filing deadline, 8 U.S.C. 1252(b)(1), applies to petitioner's case and whether the petition for review was timely filed. Pet. App. 7; see *id.* at 8-9. Petitioner responded through her counsel that the 30-day deadline of Section 1252(b)(1) does apply. *Id.* at 52. She argued, however, that the petition for review was timely filed, and the court of appeals had jurisdiction to consider her case on the merits, because the petition for review was filed "within thirty (30) days of proper Notice being furnished to [her] attorney" through the August 30, 2002, second mailing. *Id.* at 58.

The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 4-6. The court explained that "[t]o be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals's May 17, 2002, final order of removal. See 8 U.S.C. § 1252(b)(1). The petition, filed on September 26, 2002, is untimely." Pet. App. 4.

ARGUMENT

The court of appeals correctly applied 8 U.S.C. 1252(b)(1), and its application of the statute does not conflict with any decision of this Court or any other court of appeals. Furthermore, petitioner had remedies that might have allowed her to maintain a timely petition for review in the court of appeals. The Board of Immigration Appeals has prospectively addressed situations like petitioner's through new agency procedures governing second mailings of BIA decisions. For all those reasons, review of the unpublished order of the court of appeals is not warranted.

1. The plain language of 8 U.S.C. 1252(b)(1) states that an alien's petition for review of a final order of removal "must be filed not later than 30 days after the date of the final order." The date of the BIA's final order in petitioner's case, as stated on the order itself, was May 17, 2002. Pet. App. 12. Accordingly, petitioner's petition for judicial review was untimely.

2. Petitioner contends (Pet. 5-9) that the court of appeals' rejection of her proposed reading of Section 1252(b)(1)—*i.e.*, that the time for filing a petition for review begins to run upon the BIA's "proper" mailing of its order, Pet. 5—conflicts with decisions of the Second, Fifth, and Ninth Circuits. Petitioner is mistaken.

In *Martinez-Serrano* v. *INS*, 94 F.3d 1256 (9th Cir. 1996), cert. denied, 522 U.S. 809 (1997), and *Zaluski* v. *INS*, 37 F.3d 72 (2d Cir. 1994), the courts found petitions for review timely on facts similar to those here. Those cases, however, arose under 8 U.S.C. 1105a(a)(1) (1994), which provided that petitions for review had to be filed within 90 days (or 30 days in some cases) "after *the date of the issuance* of the final deportation order" (emphasis added). The dispute in those cases involved whether a BIA order could be "issued" under that former provision before it was served in accordance with agency regulations. See *Martinez-Serrano*, 94 F.3d at 1258-1259; *Zaluski*, 37 F.3d at 73. By contrast, issuance of the BIA's decision is not material to applying the filing deadline in current Section 1252(b)(1), which governs this case.

Ouedraogo v. *INS*, 864 F.2d 376 (5th Cir. 1989), arose under an even earlier version of the judicial-review provision. See *id.* at 378 & n.2. Like current Section 1252(b)(1), that version made "the date of the [BIA's] final * * * order" the relevant date for calculating the

filing deadline. 8 U.S.C. 1105a(a)(1) (1982). The Fifth Circuit determined that "the time for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's address of record." 864 F.3d at 378; see 8 C.F.R. 3.1(f) (1988 & 2003). The Seventh Circuit subsequently criticized *Ouedraogo* as an incorrect application of former Section 1105a(a)(1) and noted that *Ouedraogo* is inconsistent with this Court's statement in *Stone* v. *INS*, 514 U.S. 386, 405 (1995), that Section 1105a(a)(1) established a "jurisdictional" rule that had to be "construed with strict fidelity to [its] terms." See *Nowak* v. *INS*, 94 F.3d 390, 391-392 (7th Cir. 1996). The Fifth Circuit has not applied *Ouedraogo* to current Section 1252(b)(1), nor has it ever considered whether the filing rule stated in *Ouedraogo* under former Section 1105a(a)(1) survived the later decision in *Stone*. Accordingly, there is no circuit conflict concerning the correct application of current Section 1252(b)(1).

3. Petitioner argues (Pet. 9) that applying Section 1252(b)(1) as written in a case such as this, to require the filing of a petition for judicial review within 30 days of the BIA's final order of removal, has "far-reaching and devastating effects." That is not so, for a number of reasons.

First, as the Seventh Circuit explained in *Nowak*, an alien or her counsel may check periodically whether the BIA has ordered the alien removed from the United States. See 94 F.3d at 391.

Second, petitioner had potential remedies even after she failed to check the BIA's docket within the 30-day period for filing a petition for review. If petitioner had checked the docket within 90 days of the BIA's decision, *i.e.*, by August 15, 2002, she could have filed a timely motion to reopen asking the BIA to reissue its

removal order and thereby allow the filing of a timely petition for judicial review. See 8 C.F.R. 3.2(c)(2) (2003). Furthermore, even after she received notice of the May 17, 2002, removal order, petitioner could have asked the INS to join with her in filing a motion to reopen; if the INS had agreed, the joint motion would have been timely. See 8 C.F.R. 3.2(c)(3)(iii) (2003).

Finally, on June 20, 2003, the Office of the Clerk of the BIA adopted Administrative Directive 03-02, which established new internal operating procedures relevant to this case. In circumstances like the ones in this case, or when a mailing error is brought to the BIA's attention by a party, the new procedures require the Clerk's Office to re-date and reissue the BIA's removal order as of the date of the second mailing to the alien. That new procedure should prospectively resolve the policy concerns discussed in the instant petition for a writ of certiorari.

For the foregoing reasons, this case presents no issue of ongoing significance warranting review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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